No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES D/B/A NIFLA, ET AL., PETITIONERS,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CALIFORNIA CATHOLIC CONFERENCE, THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, LUTHERAN CHURCH-MISSOURI SYNOD, CHRISTIAN LEGAL SOCIETY, AND AGUDATH ISRAEL OF AMERICA SUPPORTING PETITIONERS

ANTHONY R. PICARELLO, JR.
JEFFREY HUNTER MOON
MICHAEL F. MOSES
HILLARY BYRNES
United States Conference of Catholic Bishops
3211 Fourth Street, N.E.
Washington, DC 20017

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

Additional counsel listed on inside cover

LISA J. GILDEN
The Catholic Health Association of the United States
1875 Eye Street NW
Suite 1000
Washington, DC 20006

KIM COLBY
Christian Legal Society
8001 Braddock Road
Suite 302
Springfield, VA 22151

SHERRI C. STRAND
JAMES W. ERWIN
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101

ABBA COHEN
DAVID ZWIEBEL
MORDECHAI BISER
Agudath Israel of America
42 Broadway
New York, NY 10004

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

For *amici*, this case is not principally about abortion. At bottom, it is about the First Amendment right of *all* religious organizations to choose for themselves not only what to say, but "what not to say." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). If upheld by this Court, the Ninth Circuit's decision would allow governments of all stripes to tell such organizations "what they must say," *Agency for International Development* v. *Alliance for Open Society*, 570 U.S. 205, 211 (2013) (citation and quotation marks omitted), on a range of controversial issues.

This would be devastating to many religious organizations, regardless of their views on abortion or similar issues. For reasons of religious belief, religious organizations are often "countercultural" vis-à-vis the various communities in which they operate: Their beliefs usually lead them to embrace at least some values that clash with the prevailing values of the towns, cities, and states in which they are located—not to mention the values embraced at any given time by the federal agencies with which they interact. Those clashes may turn, not only on disagreements over human sexuality (including abortion), but also on a range of other issues, such as the proper treatment of undocumented immigrants. Such clashes in values can often lead to attempts by governments to impose their own values—and desired messages—on religious organizations.

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[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

Indeed, this Court has observed that "government *suppression* of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (first emphasis added). That is no less true of government *compulsion* of speech.

The Ninth Circuit's decision would invite and facilitate such compulsion. Accordingly, as the various examples discussed below show, that decision is a wrecking ball aimed at First Amendment rights enjoyed, not just by religiously-affiliated pregnancy centers, but by all institutions of faith. And that is why *amici*—religion-based organizations described in the Appendix—urge the Court to reverse that misguided decision.

STATEMENT

The facts of this case illustrate its implications for all religious institutions.

1. As the Ninth Circuit noted, Petitioners "are three religiously-affiliated non-profit corporations." Pet. 10a. They exist to encourage women not to seek abortions, by "offering information about alternatives to abortion and help pursuing those options." See *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2527 (2014).

California's legislature disagrees with Petitioners' goals. It has concluded that "[m]illions of California women are in need of . . . abortion services[.]" Pet. 6a. The legislature has therefore passed numerous laws making abortion available to more women.[2] Indeed, among the fifty states, California's laws probably do the most to popularize and facilitate abortion.[3]

But these laws expanding access to abortion were apparently not enough. In passing the Reproductive FACT Act[4] the legislature concluded that Petitioners were impermissibly convincing women *not* to have abortions. Indeed, as the Ninth Circuit explained, the legislature concluded that Petitioners' very "existence" hinders the ability of women to get an abortion. Pet. 7a. And the legislature attacked what, for many, is a core religious belief—that one can provide a sufficient

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[2] See, *e.g.*, Assembly Bill 154 (Cal. 2013) (permitting broad category of professionals to perform certain types of abortion).

[3] See Ian Lovett, *California Expands Availability of Abortions*, N.Y. Times (Oct. 9, 2013) ("[T]he new California law goes further"), http://www.nytimes.com/2013/10/10/us/california-expands-availability-of-abortions.html.

[4] See Cal. Welf. & Inst. Code § 123470 *et seq.*

range of pregnancy-related services without providing abortions—as mere posturing. See Pet. 7a.

Attempting to limit the effect of Petitioners' efforts, the legislature singled them out for special burdens. As Petitioners explain in greater detail (at 7–14), the FACT Act requires licensed health care providers that do not offer abortions but do offer pregnancy counseling to display the following message: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at" that office's telephone number. Cal. Health & Safety Code § 123472(a)(1).

The purpose of these signs could not be clearer: to conscript non-profits that oppose abortion to tell women how they may obtain one. The legislature is thus attempting to undercut the central purpose of these religious non-profits' activities.

2. Petitioners sued under, among other authorities, the Free Speech Clause. But the district court and Ninth Circuit both concluded that the Free Speech Clause was not violated. While it apparently conceded that the disclosures are speech, the Ninth Circuit held (at Pet. 28a–33a) that Petitioners' speech is professional speech and that, despite being content-based, the FACT Act is viewpoint-neutral (Pet. 18a–22a) and, therefore, not subject to strict scrutiny.

SUMMARY OF ARGUMENT

Petitioners have persuasively explained why the "disclosures" required by the FACT Act violate the First Amendment's Free Speech clause. Rather than restate Petitioners' points, *amici* offer (1) an analysis of why that question is of enormous and increasing practical importance to religious institutions generally, and (2) an approach to resolving the question presented that accounts for its effects on non-profit religious institutions of all stripes, yet leaves for another day broader questions about the proper application of the Free Speech Clause in for-profit settings.

I. If affirmed, the Ninth Circuit's resolution of the question presented would have disastrous effects on religious organizations generally. Whether in the context of government-compelled "disclosures" like those in the FACT Act, notifications to employees, or even speech codes, religious institutions are increasingly facing mandates to speak. Worse, these mandates frequently conflict with the institutions' religious beliefs and thus force them to speak *contrary* to those beliefs. Affirming the Ninth Circuit's decision would give a green light to analogous speech mandates in a variety of other settings.

II. The Court could easily resolve this case on the ground that, contrary to the Ninth Circuit's conclusion, the FACT Act constitutes viewpoint discrimination and is therefore subject to strict scrutiny, which it cannot satisfy for all the reasons explained by Petitioners. However, that resolution would lead many governments to believe that, as long as they are just more careful about it, they can still "tell people"—including religious organizations—"what they must say." *Alli-*

ance for Open Society, 133 S. Ct. at 2327. And governmental speech mandates directed at religious institutions would continue to proliferate.

To prevent that result—and the consequent need for years of litigation over the proper application of the Free Speech Clause to speech mandates imposed on religious institutions—*amici* urge the Court to resolve this case on a different and arguably narrower ground: Where, as here, a message the government seeks to compel runs counter to the beliefs of a religious nonprofit subject to a speech mandate, that mandate must satisfy strict scrutiny. As explained in detail below, that approach is compelled by a long line of this Court's precedent. And it would protect religious nonprofits like Petitioners and *amici* from future efforts to compel speech in violation of religious beliefs.

ARGUMENT

I. Governments of all stripes are increasingly trying to coerce institutions of faith to endorse secular ideas that contravene the institutions' religious beliefs.

When it comes to efforts to compel speech by religious institutions, this case is only the tip of the iceberg. Indeed, the Fourth Circuit recently struck down a Baltimore ordinance similar to the FACT Act as applied to a clinic hosted at a local Catholic church. See *Greater Balt. Ctr. for Pregnancy Concerns* v. *Mayor & City Council of Balt.*, 2018 WL 298142 (4th Cir. Jan. 5, 2018). And other governments throughout the Nation increasingly attempt to coerce institutions of faith to communicate ideas that further the government's secular policies but contravene religious beliefs. If it stands, the Ninth Circuit's holding that laws like the FACT Act need only satisfy intermediate scrutiny will accelerate this dangerous trend.

1. For example, a bill passed by the California Legislature just last year (but vetoed by the governor) would have required *all* employers—houses of worship and other religious institutions included—to publish notices in their employee handbooks stating that non-ministerial employees have a right to be free from "any adverse action . . . for their reproductive health decisions[.]" See Assembly Bill 569 (Cal. 2017).

This provision, much like the signs in this case, would clearly compel speech. And the bill's broader purpose, according to its sponsor, was to change the hiring practices of local religious organizations: The sponsor specifically mentioned that the bill would impact the Diocese of Santa Rosa, California and its Parishes, which hire individuals who will act in

accordance with religious teachings.[5] But because the law would have applied to all employers, not just churches, the law would likely have survived a free speech challenge under the Ninth Circuit's logic.

2. The burgeoning effort to compel speech also directly affects religion-based organizations such as religious schools and hospitals. For example, the City of St. Louis has tried to prevent religious schools and other institutions from even *stating* a preference to hire people whose conduct conforms to the institution's central religious tenets. Specifically, the City has forbidden all employers—including houses of worship and other religious institutions—from "mak[ing] any inquiry in connection with prospective employment, which expresses directly or indirectly any preference, limitation, specification or discrimination because of reproductive health decisions[.]" City of St. Louis, Mo., Ordinance 70459 § 2(B)(5) (Feb. 1, 2017).

In response, the Catholic Archdiocesan Elementary Schools have sued the City for the right to state and abide by their religious hiring preferences. In the memorandum supporting summary judgment filed by the City, the City argues that its ordinance does not violate the Free Speech Clause as applied to the Archdiocese and its schools. Further, because the "Archdiocese [schools] will not hire people who have [had] abortions," the city says, the law seeks to protect the

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[5] California Executive Committee on Judiciary, Committee Report, AB569 at 3, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB569 (click on link that says "04/21/17- Assembly Judiciary").

Archdiocese's employees and potential employees from "reproductive health discrimination."[6]

In so doing, St. Louis repeats some of the very arguments the Ninth Circuit embraced. For example, the city claims that, because "[n]o viewpoint is being supported or demonized by this Ordinance," the ordinance is viewpoint-neutral.[7] This argument is nearly indistinguishable from the Ninth Circuit's claim that "the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." Pet. 20a.

Accordingly, if affirmed by this Court, the Ninth Circuit's decision would likely permit and encourage other jurisdictions to compel the speech of all religious organizations—including religious hospitals and schools as well as houses of worship—in the manner that St. Louis is now attempting to do.

3. Other examples come from Iowa and Massachusetts, which now effectively require houses of worship and other religious institutions to address individuals using pronouns contrary to how some religious bodies view sex and gender identity.[8] In Massachusetts, the

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[6] Defendant's Memorandum in Support of Summary Judgment, *Our Lady's Inn* v. *City of St. Louis* at 10, 4:17-10543, Dkt. # 20-2 (E.D. Mo. Oct. 30, 2017).

[7] *Id.* at 9.

[8] Although the Iowa and Massachusetts laws do not specifically single out the use of pronouns based on biological sex as inherently discriminatory, the agency determinations that such conduct is discriminatory are likely to be persuasive in court. See Iowa Code § 216.5 (granting agency extensive power to implement nondiscrimination laws); Mass. Ann. Laws ch. 151B, § 3 (similar).

relevant state guidance document notes that "a religious organization may be subject to" such a requirement whenever it "engages in or its facilities are used for a 'public, secular function'"—which of course is true of almost all houses of worship.[9] Likewise, the Iowa guidance document notes that "[p]laces of worship (e.g. churches, synagogues, mosques, etc.) are generally exempt from the Iowa law's prohibition of discrimination, *unless* the place of worship engages in non-religious activities which are open to the public"—which, again, virtually all houses of worship do.[10]

Such policies conflict with the teachings of some faiths that they should say only true things, including what they view as the truth about how God "made [mankind] at the beginning . . . male and female."[11] For these houses of worship, their members, and their affiliated charities and other institutions, stating that someone's true sex is different from the person's biological sex contradicts this truth regarding human creation. In their view, the law now compels them to affirm something with which they disagree.

Purporting to limit such state policies to a religion-based organization's "secular" activities does not solve the problem. As this Court noted in *Corporation of Presiding Bishop* v. *Amos*, there "is a significant burden on a religious organization" if it has "to predict which

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[9] Mass. Comm'n Against Discrimination, *Gender Identity Guidance* 1, 4 (Dec. 5, 2016), http://www.mass.gov/mcad/docs/gender-identity-guidance-12-05-16.pdf [https://perma.cc/CSW6-G3SN].

[10] Iowa Civil Rights Commission, *Sexual Orientation and Gender Identity: A Public Accommodations Provider's Guide to Iowa Law*, https://icrc.iowa.gov/sites/default/files/publications/2016/2016.sogi_.pa1_.pdf.

[11] *Matthew* 19:4; *Genesis* 1:27.

of its activities a secular court will consider religious." 483 U.S. 327, 336 (1987). Indeed, "fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Ibid.* And many church activities—a book club, a bake sale, or a gymnasium as in *Amos*—may appear secular yet represent important parts of the church's religion-based outreach. Perhaps just as important, these "secular" activities fulfill a religious mission to bring greater unity to an American culture whose success hinges on seeking harmony in diversity.[12] And of course, although religious schools and hospitals may provide some services that are also offered by secular institutions, the government has long recognized that they are bona fide religious organizations because of their affiliation with a church or their grounding in a church's religious traditions and beliefs.[13]

4. Another example of an intrusive policy that the Ninth Circuit's approach would allow arises from the current administration's efforts to punish what some call "sanctuary cities," which seek to assist undocu-

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[12] See Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000). Such outreach is often rooted in express religious teachings. See, *e.g.*, *Luke* 10:25–37 (parable of good Samaritan); Vatican II, *Gaudium et Spes*, No. 29 ("Every form of social or cultural discrimination in fundamental personal rights on the grounds of sex, race, color, social conditions, language, or religion must be curbed and eradicated as incompatible with God's design."); 2 *Nephi* 26:33 (Latter-day Saint) ("[Christ] denieth none that come unto him, black and white, bond and free, male and female; and he remembereth the heathen.").

[13] See, *e.g.*, *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652 (2017); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012).

mented immigrants. Many religious institutions, including houses of worship and religious colleges, have religious doctrines urging compassion for immigrants, whether or not the immigrants have proper documentation.[14] And yet, if the administration decided to further pursue its immigration policy goals, religious colleges or houses of worship could well be compelled to disclose to their members and others a government-prescribed message contrary to their religious beliefs about immigration—a message, for example, articulating an obligation to cooperate with immigration authorities. Under the Ninth Circuit's rationale, the administration could readily immunize such a policy from strict scrutiny, and make it subject only to intermediate scrutiny as viewpoint neutral, by also applying the policy to institutions that *support* the administration's policy.

Here again, if the Ninth Circuit's ruling stands, religious organizations will have no free-speech defense to these and many other laws that seek to force such institutions to propagate governmental messages that contradict the institutions' religious beliefs.

5. As these examples show, affirming the Ninth Circuit's ruling would open the door to blatant targeting of religious institutions nationwide. In the future,

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[14] *E.g. Leviticus* 19:34 ("The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt."). Some houses of worship have even declared themselves "sanctuary churches." See, *e.g.*, Southside Presbyterian Church, *The Sanctuary Movement*, http://www.southsidepresbyterian.org/sanctuary.html (detailing the history of the "sanctuary church" movement and claiming the support of approximately 800 congregations).

for example, governments could well try to force religious institutions to promote messages (e.g., "Living a celibate lifestyle can lead to depression. Here are some resources for depression.") that contradict religious teachings on chastity and sexuality.[15] Other compelled messages (e.g., "Studies have shown that children really do not need parents of both genders") could just as easily contradict the belief of some faiths and religiously-oriented institutions that, where possible, children should be raised by both a mother and father.[16]

These sorts of messages are not like traditional commercial disclosures, such as ingredient lists and calorie counts on food labels. Rather, these kinds of compelled "disclosures"—including those at issue in this case—force those on one side of a political or social debate to propagate the views of their opponents, and in a way that is designed to diminish or even neuter the speaker's own views. No religious institution should be required to make these sorts of "disclosures" when they contradict the institution's religious beliefs. But if the decision below is affirmed, more and more governments around the country are likely to target houses of worship and other religious institutions in just that way.

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[15] *E.g.*, 1 *Corinthians* 6:18 ("Avoid immorality. Every other sin a person commits is outside the body, but the immoral person sins against his own body."). Multiple religious traditions teach that a chaste lifestyle leads to happiness for both the individual and others. *E.g.* 3 *John* 1:4 ("Nothing gives me greater joy than to hear that my children are walking in the truth.").

[16] *E.g. Human Sexuality: A Theological Perspective* 17–20 (1981) (Lutheran); *Catechism of the Catholic Church* §§ 1631, 1641, 1653, 1666; *The Family: A Proclamation to the World* (1995) (Latter-day Saint).

II. This Court should hold that the Free Speech Clause does not permit governments to apply even supposedly neutral speech requirements against objecting non-profit institutions of faith without satisfying strict scrutiny.

To prevent such harms to free speech, this Court should hold that the Free Speech Clause requires that the application of "disclosure" laws such as the FACT Act pass strict scrutiny. And the cleanest way to do that here is to hold that a mandate directing an objecting religious non-profit to convey the State's preferred message is *always* subject to strict scrutiny. Alternatively, strict scrutiny is required because, contrary to the Ninth Circuit's conclusion, the FACT Act is based on viewpoint discrimination, not just content. And for all the reasons explained by Petitioners (at 49–57), the FACT Act cannot survive strict scrutiny.

A. A requirement that an objecting religious non-profit convey the State's preferred message should always be subject to strict scrutiny.

Regardless of its targeting of politically-disfavored speech, the FACT Act's compelled speech requirement should be subject to strict scrutiny. The Ninth Circuit attempted to avoid this result in part by holding that Petitioners' government-required speech about abortion is "professional" speech, subject only to intermediate scrutiny. Pet. 28a–29a. But that cannot be correct: Petitioners are all *non-profit* organizations incorporated to pursue *religious* missions that include speech opposing abortion and endorsing alternatives. Pet. 89a–90a. Whatever the standard may be in other circumstances, with other kinds of speakers, it makes no

sense to allow the State to compel speech from institutions like Petitioners without satisfying strict scrutiny.

1. One of the First Amendment's deepest concerns is to protect religious expression from government coercion. Indeed, as this Court has noted, "a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760 (1995). As explained above, religious institutions are frequently countercultural: Owing their allegiance to divine authority, they often find themselves at odds with the norms prevailing in their local communities, or in the broader world.

This Court has accordingly recognized that those institutions are best served (and can best serve their members and society) under guarantees of autonomy, specifically, "an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). In a long line of cases—many under the Establishment and Free Exercise Clauses—this Court has guaranteed the right of such organizations to determine their own messages without government interference. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 188 (2012) (holding that anti-discrimination laws cannot be deployed to "depriv[e] [a] church of control over the selection of those who will personify its beliefs").

Other non-profit religious organizations are likewise central to the First Amendment's protections. Even in cases of disagreement about the outer bounds of the religion clauses in the for-profit realm, everyone

agrees that "[t]he First Amendment's free exercise protections . . . shelter churches *and other* non-profit religion-based organizations." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., joined by Sotomayor, J., dissenting) (emphasis added). Some such organizations exist to serve a religious community. *Ibid.* Others exist to win converts to their religious views, or—like Petitioners—put their religious community's principles to work through service in the world at large. Petitioners thus stand at the intersection of two circumstances in which this Court has always considered constitutional protections most important: they are organizations that are *both* religious and non-profit in nature. See, *e.g.*, *Amos*, 483 U.S. at 344-45 (Brennan, J., concurring) (constitutional concerns at their height with respect to non-profit activities of religious organizations).

2. In light of Petitioners' religious and non-profit character, treating their speech like the ordinary advice of professionals serving clients ignores reality. When religious non-profits speak, they are not merely providing professional services. Rather, they are performing religious functions and conveying messages that they believe hold ultimate significance. Their speech thus lies at the core of the First Amendment's protections.

This Court, moreover, has always held that strict scrutiny applies whenever the government compels types of expression approaching that level of importance. See *Wooley* v. *Maynard*, 430 U.S. 705, 716 (1977) (evaluating whether the State had an "interest . . . sufficiently compelling to justify requiring appellees to display the state motto on their license plates") (citation omitted); see also *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573

(1995) (explaining that the State "may not compel affirmance of a belief with which the speaker disagrees") (citation omitted). This Court's precedent thus "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760.

Moreover, strict scrutiny applies "not only to [compelled] expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Even on the State's assumptions, that holding describes the present case perfectly. It follows that strict scrutiny should apply.

The Fourth Circuit recently reached a similar conclusion. In ruling that a Baltimore city ordinance, similar to the FACT Act, is unconstitutional as applied to religious non-profits, that court noted that the ordinance was "antithetical to the very moral, religious, and ideological reasons the [non-profit] exists." *Greater Balt. Ctr. for Pregnancy Concerns* v. *Mayor & City Council of Balt.*, 2018 WL 298142 at *5 (4th Cir. Jan. 5, 2018). The court further held that, unless such institutions enjoy a right "to [not] utter political and philosophical beliefs that the state wishes to have said," "states [could] bend individuals to their own beliefs and use compelled speech as a weapon to run [their] ideological foes into the ground." *Ibid.*

Perhaps California or Baltimore could regulate some kinds of secular, for-profit speakers in the way in which they seek to regulate the institutions in these cases. But absent a showing that the law survives strict scrutiny, neither they nor any other jurisdiction can be allowed to compel speech from religious institutions that disagree with the government's message on

religious grounds. Yet that is what California is doing here: declaring Petitioners a threat to their policy goals and compelling their contrary speech. See *supra* pp. 3–4; Pet.Br. 7–8. The decision below must be reversed for this reason alone.

3. Moreover, the legislative history and text of the FACT Act show that the legislature enacted the law because it disagrees with the religious speech of Petitioners and other religious organizations. The legislature is thus trying to discredit religious speech in favor of its preferred, secular message—that is, it is attempting to "use compelled speech as a weapon to run its ideological foes into the ground." *Greater Baltimore Center, supra,* 2018 WL 298142 at *5. This is unquestionably unconstitutional in the religious setting, whatever the status of analogous secular speech.

A simple analogy explains the unconstitutionality of a state attempting to discredit religious speech. It would be an obvious violation of the Free Speech Clause for a state to mandate that, as a condition of allowing publication of a religious text, a statement be included suggesting sources contradicting that text's core teachings. At a minimum, such a disclaimer would have to survive strict scrutiny. But the Ninth Circuit claims that the FACT Act should receive *intermediate* scrutiny even though it forces Petitioners to preface their religious statements, both orally and in written materials, with government-compelled messages that effectively urge readers to question Petitioners' own statements. This religious targeting violates the First Amendment.

This analogy also illustrates why this Court need not answer in this case questions about whether the First Amendment permits similar regulation of for-

profit speakers. While California may regulate (for example) medical textbooks to ensure adequate training of its doctors, it may not regulate the content of religious texts instructing on how to minister to the sick.

At very least, compulsion of speech from religious non-profits like Petitioners should not be subject to *less* scrutiny than this Court applied to an individual's objection to his State's motto, see *Wooley*, 430 U.S. 705, or to a cultural organization's annual parade, see *Hurley*, 515 U.S. 557. Once again, religious speech is not a First Amendment orphan. *Pinette*, 515 U.S. at 760. Indeed, the conjunction of a highly suspect compelled speech requirement with the highly protected status of religious non-profits makes strict scrutiny all the more appropriate. Cf., *e.g.*, *Employment Div.* v. *Smith*, 494 U.S. 872, 881 (1990).

4. This approach—a safe harbor for non-profit religious institutions under the Free Speech Clause—would allow the Court to protect a substantial swath of clearly protected activity while reserving more difficult issues for future cases. This Court has long distinguished for-profit commercial speech from other types of speech. See, *e.g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Although *amici* take no position on the legitimacy of that approach, the difference between religious non-profits and ordinary commercial entities—and any differences in the overall content of those entities' speech—would allow the present case to be distinguished from an otherwise-similar controversy involving a purely secular medical practice, or a large publicly-held company. If such a case were ever presented, this Court should address it on its particular facts.

In short, because strict scrutiny protection for religious non-profits makes sense for unique reasons, applying that level of scrutiny to *this* case defers the question of how to review similar laws in other contexts. Cf. *Hobby Lobby*, 134 S. Ct. at 2774 (explaining that the Religious Freedom Restoration Act applied because "[t]he companies in the cases before us are closely held corporations").

For all these reasons, the Court should rule that the Free Speech Clause requires strict scrutiny of any governmental attempt to force Petitioners to convey a government-endorsed message in conflict with their religious belief, simply because they are religious non-profits.

B. The State's action here was viewpoint-based and therefore subject to strict scrutiny for that reason as well.

In any event, there is no question that the FACT Act was intended to—and in fact does—compel groups that convey a politically-disfavored message to convey the State's message as well. And this Court has long held that strict scrutiny applies to "speaker-based laws . . . when they reflect the Government's . . . aversion to what the disfavored speakers have to say[.]" *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 658 (1994). To hold that strict scrutiny applies here, this Court need only apply that well-established rule to the undisputed facts of this case.

The FACT Act particularly targets speakers—including Petitioners—who regularly disseminate messages with which the State disagrees. The whole point of the FACT Act, as the Legislature openly admitted, was to destroy the effectiveness of "'crisis pregnancy centers'" that "'aim to discourage and prevent women

from seeking abortions'" by "'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" Pet. 7a (quoting Assembly Committee on Health, Analysis of Assembly Bill No. 775 at 3). In the State's view, crisis pregnancy centers "'often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.'" Pet. 7a (quoting Analysis of Assembly Bill No. 775 at 3).

Having determined that the speech of crisis pregnancy centers is "confus[ing]" or mistaken, Pet. 7a, the State decided that the most appropriate response was to compel them to convey the State's message as well. In the Ninth Circuit's words, "the Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics . . . to state the existence of these services." Pet. 7a.[17] The State thus elected to make the clinics "an instrument for fostering public adherence to a specific ideological point of view"—namely, the acceptability of abortion as a method of birth control—that Petitioners "find[] unacceptable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977).

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[17] The State's concern that crisis pregnancy centers "misinform" and "intimidate" women is a smokescreen. Pet. 7a. California did not need a new law to address such problems: it already had an extensive regulatory system directed at unfair and deceptive trade practices, which would already be implicated if misinformation or deception were present here. See Cal. Bus. & Prof. Code § 17200 *et seq.* (Unfair Competition Law); Cal. Bus. & Prof. Code § 17500 *et seq.* (False Advertising Law); Cal. Civ. Code § 1770 *et seq.* (Consumer Legal Remedies Act).

Other aspects of the FACT Act underscore that clinics with Petitioners' particular moral perspectives were intended to bear a special burden. For example, the law contains an exception for any "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program," Pet. 80a, which is the State's system of "reproductive health care" providers. See Cal. Welf. & Inst. Code § 14132. The FACT Act was crafted, in other words, to exempt licensed clinics that are *already* putting out the State's preferred message about abortion. Conversely, the only licensed providers that the FACT Act affects are those that the State believes are *not* adequately communicating the government's message.

The inference can hardly be clearer: The State disliked the speech of certain organizations, and set out to muddy, obscure, and drown it out through legislation. That is clear from the Ninth Circuit's account of the FACT Act, not merely Petitioners' or *amici*'s. But whatever a given policymaker might think about abortion, "freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev.* v. *All. for Open Soc'y*, 570 U.S. 205, 133 S. Ct. 2321, 2327 (2013) (quotes omitted). To target a disfavored category of speakers based on aversion to their speech is the essence of a viewpoint-based restriction on speech, and it calls for strict scrutiny. *Turner Broad.*, 512 U.S. at 658; see also *Reed* v. *Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015). The Ninth Circuit gravely erred by applying merely intermediate scrutiny instead.

CONCLUSION

The Ninth Circuit's decision is a judicial wrecking ball that, if affirmed by this Court, would destroy a large swath of First Amendment rights properly enjoyed, not only by religiously-affiliated pregnancy centers, but by all institutions of faith. The decision below should be reversed.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.
JEFFREY HUNTER MOON
MICHAEL F. MOSES
HILLARY BYRNES
United States Conference of Catholic Bishops
3211 Fourth Street, N.E.
Washington, DC 20017

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

LISA J. GILDEN
The Catholic Health Association of the United States
1875 Eye Street NW
Suite 1000
Washington, DC 20006

KIM COLBY
Christian Legal Society
8001 Braddock Road
Suite 302
Springfield, VA 22151

SHERRI C. STRAND
JAMES W. ERWIN
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101

ABBA COHEN
DAVID ZWIEBEL
MORDECHAI BISER
Agudath Israel of America
42 Broadway
New York, NY 10004

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